United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/ affidavit of mailing

76-1278

To be argued by
DOUGLAS J. KRAMER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1278

b p/s

UNITED STATES OF AMERICA,
Appellee,

—against—

ROBERT L. VAN MEERBEKE and
DONALD M. JONES,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

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Preliminary Statement

Robert L. Van Meerbeke and Donald M. Jones appeal from judgments of the United States District Court for the Eastern District of New York (Bramwell, J.) entered on May 28, 1976, convicting them, after a jury trial, of conspiring to import opium into the United States, in violation of Title 21, United States Code, Section 963, and of the substantive crime of importation of 10 pounds of opium, in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

Appellant Van Meerbeke was sentenced to five years imprisonment and a seven year special parole term; appellant Jones received a sentence of two years imprisonment and a five year special parole term. Appellant

Jones is incarcerated and serving his sentence; appellant Van Meerbeke is free on bail pending this appeal.

Appellants raise two issues. They argue first that the ingestion of opium by the Government's chief witness, while he was on the witness stand, rendered him incompetent to testify and that the circumstances of the incident were such as to deprive appellants of a fair trial. Second, appellants claim that their convictions should be reversed because Judge Bramwell allegedly unduly interfered in the conduct of the trial.

Statement of Facts

Reuben Fife was the Government's chief witness at trial. The evidence showed that during February, March and April of 1975 the appellants conspired with Fife to import a quantity of opium into the United States from India.[1] The conspiracy grew out of discussions between Fife and appellant Van Meerbeke which took place in California during the latter part of 1974 and early 1975. Appellant Jones joined the criminal venture shortly before Fife left for India in March of 1975 to purchase the opium.

Fife testified that he had been to India twice prior to 1975 and that, while there, he had purchased and used various drugs (146-149).[2] In the fall of 1974, having

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[1] Fife pleaded guilty to a single count information charging him with importation of opium, in violation of Title 21 United States Code, Section 952(a). On June 27, 1975, he was sentenced to zero to two years imprisonment. Subsequently, on December 15, 1975, prior to appellants' trial, this sentence was reduced to eighteen months plus a special parole term of five years.

[2] References are to the pages of the trial transcript.

returned from his second trip to India, Fife met appellant Van Meerbeke in California (150). Thereafter, Fife and Van Meerbeke met frequently, often buying narcotics from each other (151-152) and discussing the sources and costs of narcotics in the United States and India (155).

In the course of their conversations, Van Meerbeke and Fife discussed various ways in which narcotics could be smuggled into the United States, such as by strapping the drugs to one's body or by using a suitcase (156-158). The plans for the smuggling of opium crystallized in early 1975 (159). The operation was to be financed by Van Meerbeke (169), while Fife and Jones were to act as joint couriers in bringing the opium from India into the United States. It was agreed that Fife would travel to India, taking with him a suitcase provided by Jones. In India, Fife would purchase the opium and place it in a false bottom which he would construct in the suitcase. He would then fly to London, where he would be met by Jones, who would have an identical suitcase. Thereafter, Jones and Fife would fly from London to the United States and Jones would attempt to bring the suitcase containing the opium through customs (159).

Fife was to build the false bottom in the suitcase with fiber glass by painting the fiber glass over the opium (160-162). To practice this, Fife and Van Meerbeke purchased a suitcase and fiber glass material (162). Subsequently, Jones inspected Fife's work to satisfy himself as to its quality (163-164). Fife then purchased airline tickets with money provided by Van Meerbeke and picked up, at Jones' store in California, the suitcase he would actually use to hide the opium (165-167). It was agreed amongst the three that should either Jones or Fife be apprehended, Van Meerbeke would supply a lawyer (205-206).

Fife flew to India and, after some difficulty, purchased the opium and built it into a false bottom in Jones' suitcase (171-177). During his stay in India, Fife made several telephone calls to California (177-180, see also Stipulation, Gov. Ex. 10 at 451-453). These telephone calls were made by Fife to his girlfriend, Dianne Ashville, who then contacted Van Meerbeke (177-178 and Gov. Ex. 10, *supra*). During these conversations Fife kept Van Meerbeke apprised of the progress of the conspiracy (179). In one such conversation, Van Meerbeke instructed Fife to change his flight plans from the original plan, which was to take a flight late in the day from London to New York (Flight 509) on April 14, 1975, to a new plan to take an earlier flight that same day (Flight 501) (192). This change was necessary because Jones was going to be on Flight 501 (193). Fife had difficulties arranging the flight change, however, and it was not actually confirmed until after he arrived in London (195-197).

In the meantime, Jones flew to London to meet Fife. After arriving in London, he waited for Fife at Heathrow Airport (K4).[3] Fife's flight from Calcutta was delayed (195), Jones requested information about Fife's arrival and indicated his awareness of Fife's intention to take the early flight, number 501, to New York (K4-5), although Fife was not yet listed on Flight 501 (K5). Jones then refused to check onto the early London-New York flight until he was assured that Fife would make the connection (K6). Ms. Kelly noted that the suitcase carried

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[3] References marked "K" are to the pages of the transcript containing the testimony of Susan Kelly, a BOAC employee, who testified on March 23, 1976. These pages were not consequently numbered.

by Jones was very similar to that actually used by Fife and which concealed the opium (K7).[4]

Eventually, Fife did arrive in time to make Flight 501, and he and Jones stood in the same line to board the aircraft. Though Fife nodded and smiled at Jones, Jones ignored Fife (198). After the flight took off, Jones and Fife spoke together, and Fife confirmed the success of his mission in India (200-201). Upon arrival in New York, both men left the plane separately and went to the baggage claim area to pick up the two suitcases. While waiting, they were placed under arrest by federal narcotics agents (400-404).[5] Following his arrest, Jones denied knowing Fife (412). Jones was then released (423).

Fife was held after failing to post bail. A few days after he was arrested, Fife was visited by an attorney, Jeffrey Ullman, whom he did not know and whom he had not sought to retain (215). Mr. Ullman wanted to know the nature of the charges for which Fife was being held (216), and he said that he had been sent from a New York firm at the request of a California attorney, a Mr. Singer (216). When Fife told Ullman that he was going to cooperate with the Government, Ullman asked him to wait a few days (517).

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[4] Fife's suitcase was searched at Heathrow Airport by British authorities. See note 5 *infra*.

[5] At London, Jones' inquiries about Fife and Fife's desire to catch the early New York flight arroused the suspicion of British customs officials, who inspected Fife's suitcase and found the opium (Stipulation Ex. 8). The suitcase was subsequently sent on to New York, where Drug Enforcement Administration agents took up surveillance and arrested Fife and Jones (399). Following the arrests the substance in the suitcase was removed and analyzed to be opium (413-414, 457).

Neither of the defendants took the stand in his own behalf. Appellant Van Meerbeke called attorney Ullman as a witness. Mr. Ullman testified that he never tried to dissuade Fife from cooperating with the Government, but admitted to meeting with Fife on behalf of the California attorney, Singer (482). Appellant Jones called Fife to the stand as a defense witness, and Fife admitted that he lied when he testified about the identity of the source of the opium in India (509-510). In no other respect, however, did Fife contradict the testimony which he had given when called as a government witness.

ARGUMENT

POINT I

The ingestion of opium by the witness Reuben Fife neither rendered him incompentent nor denied the appellants a fair trial.

The chief witness for the Government, co-conspirator Reuben Fife, was an acknowledged seller and user of drugs (148-149, 227-230). While testifying on direct examination on March 25, 1976, Fife was asked to identify the suitcase which he had used to smuggle opium into the United States (190). While so doing, Fife showed the jury where he had built the false bottom to conceal the opium, and he remarked that there were some pieces of opium which still remained mixed in with the fiber glass residue in what was left of the false bottom (191, 369). Trial was recessed for four days at the end of testimony on March 25, 1976. On March 29, 1976, after lunch, Fife, who was still on the witness stand, was apparently observed by one of the defense counsel to pick up something from the floor and place

it in his mouth. This occurre[illegible]e the jury was out of the courtroom. During cr[illegible]s-examination defense counsel Barry Bohrer questioned Fife about his handling of the suitcase on March 25, 1976, and about the object which he placed in his mouth on March 29, 1976. Fife stated that on March 25, 1976, he placed some of the opium which was in the suitcase in his mouth and "tasted a wee bit of it." (369). He also stated that on March 29, 1976, just as the jury entered the room, he picked up a "tiny fragment of the opium" from the floor and put it in his mouth (370).

Upon the revelation by Fife that he had twice ingested some opium, the appellants moved for a mistrial (371). The court denied the motion, noting:

> The Court: The witness has said—the witness has been coherent. The Court was able to understand him. The Court sees the jury was able to understand him. He said he took a wee bit, there doesn't seem to be anything in this witness's attitude or manner which would cause the Court to feel you are right.
>
> * * * * *
>
> There was nothing—This is a person who used a lot of drugs. It is true when the suitcase was in front of him he took a small snip, the Court saw him and the jury saw him. I didn't see him take any today.
>
> * * * * *
>
> There has been nothing in this witness's manner and it would be up to the jury to determine what they wish to believe, what they wish to disbelieve, there's nothing in his manner which in any way caused the Court to feel that he was under the influence of drugs to the extent that his testimony could not be accepted. The Court will accept it and it's for the jury to decide. (371-372).

Following the completion of the Government's case, the defense called Fife as its own witness. Prior to testifying for the defense, Fife met with the defense attorneys and another lawyer, Ivan Fisher (507, 514, 516). On the stand as a defense witness, and in the presence of the jury, Fife was examined again concerning the opium eating incidents:

> Q. Did you have any reaction to the opium you took when you were on the witness stand? A. The first time a little visual effects.
>
> Q. How would you describe the reaction? A. Spots and colors.
>
> Q. Hallucinations? A. Yeah, man I did, more like the ones I get when I'm beginning to go straight.
>
> The Court: What is your answer?
>
> The Witness: Minor hallucinations, the kind that happen to me sometimes when I don't take drugs, spots and colors, light colors. (508-509)

In its charge, the Court referred to the opium incident:

> You have heard testimony by Reuben Fife that he consumed a small amount of opium during the time he testified before you. This should be taken into consideration by you when you are evaluating his ability to actually observe those events and matters which he claims to have observed. (643).

Appellants argue that Fife's eating of opium on the witness stand and during the trial rendered him incompetent as a witness and that consequently it was error for the court not to declare a mistrial or to hold a

hearing when the incident came to light. Moreover, despite the potentially devastating effect which the opium incidents might have had on Fife's credibility as a witness, appellants also contend that they were prejudiced and deprived of a fair trial and due process by Fife's ingestion of the opium and by the alleged impropriety of the trial judge in not informing defense counsel of Fife's initial tasting of the opium when the suitcase was opened.

Fed. R. Evid. 601 provides, *inter alia*:

> Every person is competent to be a witness except as otherwise provided by these rules.

Under the early common law, persons suffering from some form of mental incapacity, temporary or permanent, were deemed unable to give trustworthy testimony at trial. 3 *Weinstein's Evidence*, § 601 [03] at 23. Until the adoption of Fed. R. Evid. 601, courts continued to insist upon this right to exclude mentally incompetent witnesses although virtually all witnesses were allowed to testify despite severe psychological and physiological infirmities. 3 *Weinstein's Evidence*, § 601 [03] at 24-25.

Fed. R. Evid. 601 has changed the common law rule. Mental competence is no longer an issue, and no hearing is required when a party seeks to raise it as an issue. Under Rule 601, mental capacity is no longer relevant with respect to the competency of a witness. No mental qualifications for testifying as a witness are specified in Rule 601 because "a witness wholly without capacity is difficult to imagine." Advisory Committee Note to Rule 601. According to one commentator, Advisory Committe recognition "that the concept of mental capacity has small basis in reality" explains why Rule 601 does

not require "any measure of mental capacity as a condition precedent to the giving of testimony." 3 *Weinstein's Evidence*, § 601 [03] at 25. Since a witness may not be deemed mentally incompetent under any set of facts, a hearing for the determination of mental competency is no longer necessary. "Since Rule 601 abolishes all grounds for disqualifying a witness . . . a preliminary examination pursuant to Rule 104(a) for the purpose of determining competency is usually no longer required." 3 *Weinstein's Evidence*, § 601 [04] at 26.

Appellants nevertheless contend that in this case a hearing was necessary to determine Fife's competency as a witness. Prior to the adoption of Rule 601, certain Circuits did follow the practice of requiring hearings to determine the mental competency of a witness at trial. See e.g. *United States* v. *Crosby*, 462 F.2d 1201 (D.C. Cir. 1972). The Second Circuit, however, has never adhered to such a rigid procedure rule. In *United States* v. *Gerry*, 515 F.2d 130, 137 (2d Cir 1975), this Court stated:

> When competency is questioned there is no legal requirement that the trial judge conduct a formal hearing. There must be such an inquiry as will satisfy the Court that the witness is competent to testify but the form of that inquiry rests in the discretion of the trial court.

In this case, the trial court's close and continuous observation of Fife's behavior and actions was sufficient to satisfy it that Fife was qualified to continue testifying even after the ingestion of the opium particles. Even assuming *arguendo* that a hearing on mental competency is required in appropriate circumstances, this case does not

present such circumstances. Here, the judge observed Fife throughout his testimony. He discerned no inimical effect upon Fife after ingestion of the opium. And it should be noted that even the *Crosby* court recognized that a formal hearing would be inappropriate in a certain case and stated that "every allusion as to the incompetency of a witness need not be exhaustively explored by the trial judge, particularly where all other evidence substantiates competency." *Crosby, supra*, 462 F.2d at 1203 n.5. In the present case, after Fife's ingestion of opium particles all the evidence substantiated the trial court's determination of competency. Fife remained lucid and his testimony continued to be coherent with respect to the events in question. Later in the trial he returned to testify as a defense witness. Accordingly, it was not necessary for the court to explore with a hearing the defendant's claim that Fife was incompetent.

Before Rule 601, mental competency was still an issue which, in the trial court's discretion, could be determined by a formal hearing. Today, however, since mental incapacity apparently no longer acts as a bar to a person's testifying, a hearing to determine competency is obviously unwarranted. Furthermore, appellants concede that defense counsel failed to request a hearing or examination of Fife upon learning of his ingestion of opium particles (Appellant Van Meerbeke's Brief p. 31). Appellants requested only a mistrial (371). Following this motion, the Court nevertheless made specific finding with respect to the competency of Fife as a witness (371-372). In addition, as noted above, the defense itself called Fife as a witness. Under these circumstances appellants cannot now be heard to complain that Fife was not competent to testify for the Government.

As noted above, in addition to claiming that Fife was not competent to testify, appellants argue that the opium

eating incident prejudiced them and deprived them of a fair trial. We respectfully submit that this is a contention wholly without merit.

Although they cry prejudice, appellants are hard put to explain exactly how their defense was in any way injured by the opium eating incident. Appellant Jones states that "it is inconceivable that the jury could avoid considering this shocking and inherently prejudicial act." He fails to explain, however, why he incident was "inherently prejudicial" to the defense. Similarly appellant Van Meerbeke attempts to allege prejudice by the tenuous speculation that by eating the opium Fife demonstrated his slavery to the drug "that was the *corpus*" of the crime charged. Appellants' difficulty in making their prejudice argument is not hard to understand. For indeed, one could scarcely imagine a greater windfall to the defense in a case such as this than to have the Government's chief witness, an accomplice of the defendants, caught in the act of eating opium on the witness stand in front of the jury, as happened with Fife. The record shows that the defense made full use of the incident on cross-examination and in summation to attack Fife's credibility (566-568). In addition, the court instructed the jury that in evaluating the testimony of Fife it should consider his eating of the opium (648). Appellants have clearly failed to demonstrate how they were prejudiced by the incident.

Finally, appellants seek to buttress their prejudice claim with the assertion that by not remarking on Fife's eating of the opium when he saw it, the trial judge communicated to the jury his condonation of the act. This argument borders on the frivolous.

Te begin with, it would not have been unreasonable for the trial judge to believe that the prosecutor and

defense counsel, as well as he, had observed the incident. The suitcase was opened in the immediate presence of both defense counsel, the prosecutor, the jury and the judge. As Fife was displaying the suitcase, defense counsel were allowed to approach the witness (191). With all three attorneys in close proximity Fife spilled some of the fiber glass particles and opium residue on the floor. All the spill was apparently not returned to the suitcase (369), and thereafter Fife apparently placed some small piece of opium residue in his mouth. The trial judge saw him do it. It is likely, however, that the court did not know for sure that it was opium which Fife had placed in his mouth until five days later, when Fife stated he had tasted the material to determine whether it was fiber glass or opium (369-370).

Furthermore, there is absolutely no basis for arguing that by not mentioning the incident the court communicated to the jury its approval of what had taken place. To begin with, such an argument is based on the assumption that the jurors were aware that the judge saw Fife eating the particles from the suitcase. There is no way of knowing this. Secondly, we fail to see how in the circumstances it can be argued that silence served as a communication. Most importantly, however, there is simply no rational basis for believing, and, indeed, it insults the intelligence of the jury to even suggest, that the judge's silence could be equated with condoning the use of narcotics by a Government witness.

POINT II

Judge Bramwell's conduct of the case in no way deprived appellants of a fair trial.

On several occasions during the trial of appellants Judge Bramwell made comments in the presence of the jury. Most of these comments were in response to comments and questions by the defense which referred explicitly and implicitly to the trial judge, thus involving him personally in the trial. Appellants contend that the court's comments constituted judicial interference and that they were thus deprived of a fair trial.

The initial incident of judicial comment in the presence of the jury occurred during the opening of Guy Heinemann, the attorney for Robert Van Meerbeke. Following Mr. Heinemann's statement that he would prove that Fife had "lied several times to his Honor, Judge Bramwell," the following occurred:

> The Court: All right, counselor. Do you have proof that he lied to me? Do you have proof of that?
>
> Mr. Heinemann: Yes, I do.
>
> The Court: If you don't have proof, don't say that, because I have no reason to believe that, and for you to say that, I don't know what your source is, but you go right ahead." (108)

Following the conclusion of the opening statements, the court explained to the defense counsel its reservations about their statements:

> While I'm telling you that, this opening by yourself and by Mr. Bohrer, in which you attempted to inject the Court as part of your case by saying that

> Mr. Fife has lied to the Court, is highly improper. I don't like it. I don't like it and there was no need for it. You could have brought out the same thing if you wanted to say this man lied about everything he said in court, you could have said that. No, you said, "He lied to Judge Bramwell". This made me speak to you in front of the jury when it happened. That's the only reason I did it, because you're trying to inject the Court into your defense, and I will not permit it. (143)

Subsequently, the judge commented on three occasions concerning other questions put to Fife on cross-examination about promises which the court might have made to Fife (2[illegible]5, 322). None of these comments could reasonably be viewed as having bolstered the credibility of the witness, but rather were designed to eliminate any inference that the court might have personal information that it was withholding from the jury. Thus, at pages 293 and 315 of the trial transcript, the judge stated that he had made no promise to the witness at sentencing and at page 322 of the transcript, the court again stated that it was not a party to any plea agreements. Similarly, at page 295, the court disassociated itself from alleged government promises, and at page 333 the court disassociated itself from any alleged special treatment that Fife might have received. In not one of his comments did the trial judge indicate the slightest opinion concerning Fife's credibility or the guilt or innocence of the defendants nor did he limit the scope of cross-examination.

Judge Bramwell's comments were directed towards removing himself as an implicit witness. Moreover, in his charge, he cautioned the jury to disregard any impression which it may have formed about his opinions from his remarks:

In any even, if you feel that you have discovered by some stretch of your imagination what this Court thinks as to either some of the testimony or the case itself, you should remove that from your mind, because I tell you here and now that I have come to no conclusion in this case, nor have I indicated to you in any way whatsoever what my feeling is with reference to the facts in the case or with reference to the guilt or innocence of the defendants. That is your province, and your job. You should not try to weigh what you believe the Court's impression may be.

* * * * *

No statement, ruling, remark or comment which I made during the course of the trial was intended to indicate my opinion as to how you should decide the case or to influence you in any way in your determination of the facts. If at any time I made any comment regarding the facts, you are at liberty to disregard it.

At times I asked questions of the witnesses. When I did so, it was for the purpose of bringing you the matter which I felt should be brought out and not in any way to indicate my opinion about the facts or to indicate the weight I think you should give the testimony of the witnesses.

You should not show prejudice toward a lawyer or his client because I found it necessary to admonish the lawyer during the course of the trial. It is the duty of the Court to admonish an attorney who out of zeal for his case does something that is not in keeping with the rules of evidence or procedure. You are to draw no inference against

the side to whom an admonition of the Court may have been addressed during the trial of the case. (617-619).

The task of the judge in a criminal case is to see that the defendant is given a fair trial. *United States* v. *Nazzaro*, 472 F.2d 302, 303-304 (2d Cir. 1973). Accordingly, the ultimate question which must be answered in any appeal involving alleged judicial misconduct is whether or not the actions of the trial court in some way "weighted the scales" against the defendant. *United States* v. *Dennis*, 183 F.2d 201, 225 (2d Cir.), *affirmed*, 341 U.S. 494 (1951). In answering that question this Court has stated that it will closely scrutinize "each tile in the mosaic of the trial" to determine whether "instances of improper behavior or bias, when considered individually or taken together as a whole," deprived the defendant of a fair trial. *United States* v. *Nazzaro*, *supra*, 304.

However, while the trial court must avoid at all times even the bare appearance of partiality, *United States* v. *Nazzaro*, *supra*, 310, the judge is still given wide discretion in the conduct of the trial. When circumstances require, he may admonish counsel for unnecessary and improper questions, *United States* v. *Glaziou*, 402 F.2d 8, 17 (2d Cir.), *cert. denied*, 393 U.S. 1121 (1969), and he is entitled to interrupt the examination of witnesses and to ask questions himself, in order to clarify the issues of the trial. *United States* v. *Curcio*, 279 F.2d 681, 682 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960); *United States* v. *Pellegrino*, 470 F.2d 1205, 1206-1208 (2d Cir.), *cert. denied*, 411 U.S. 918 (1973).

In addition, judges are not competent to be witnesses at trial over which they are presiding. Rule 605, Federal Rules of Evidence. As one commentator has stated:

> A judge may also be forced into the role of witness by questions of counsel connecting him with events relevant to the trial . . . The trial judge should use his power under Rule 611 to curtail lines of questioning connecting him to the facts of the case.

3 *Weinstein's Evidence*, § 605 [04] at 605-16.

An examination of the record in this case indicates that there is simply no rational basis for arguing, as appellants do, that Judge Bramwell's conduct deprived them of a fair trial. In the first place, the judge's statements which sought to remove himself from the trial and his admonition to rephrase questions could hardly be construed as indicating an opinion as to the guilt or innocence of the defendants. Secondly, the judge's comments neither added any critical weight to Fife's testimony nor disparaged any contention of the defense. Finally as shown above, the court carefully instructed the jury that it alone was the judge of the facts in the case. Clearly, the court's comments did not prejudice the appellants. See e.g. *United States* v. *Marshall*, 526 F.2d 1349, 1362 (9th Cir. 1975); *United States* v. *Crouch*, 528 F.2d 625, 632-633 (7th Cir. 1976); *United States* v. *D'Anna*, 450 F.2d 1201, 1206 (2d Cir. 1971).[6]

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[6] The conduct of the trial judge in the case at bar did not begin to approximate the conduct condemned by this Court in the cases cited by appellants. Thus, in *United States* v. *Nazzaro*, *supra*, the trial judge assumed the prosecutor's role, participating extensively in the examination of witnesses, rehabilitating the credibility of prosecution witnesses and expressing doubt about the credibility of defense testimony. In addition, the trial court gave only cursory instruction to the jury concerning the court's participation in the trial. In *United States* v. *Persico*, 305 F.2d 534 (2d Cir. 1962), the government's case rested entirely on the uncorroborated testimony of a co-conspirator accomplice. In

[Footnote continued on following page]

Furthermore, when the opium eating incident and the judge's comments are viewed in their proper setting, in the context of the whole trial, cf. *Glasser* v. *United States*, 315 U.S. 60, 83 (1941), it is readily apparent that they were of only minimal significance. Evidence of guilt in this case was overwhelming. The testimony of Fife concerning his trip to India, purchase of opium, and return to the United States was uncontradicted and undisputed except as to the source of the opium in India. Similarly, Fife's friendship and familiarity with appellant Van Meerbeke, and the close relationship between Van Meerbeke and Jones, were admitted by defense counsel in their openings. At issue solely was the involvement of appellants in Fife's drug smuggling activities. Ample independent corroborating evidence was adduced at trial to support Fife's testimony at its crucial junctures. Thus, telephone tolls showing frequent calls between India and San Francisco, including a toll record showing a call by "Bob" were introduced by stipulation (Gov. Exs. 8-11 at 442-457). An independent witness, Susan Kelly, testified about the activities of appellant Jones in London, including his expressed knowledge about Fife's change in flight plans, a change ordered by Van Meerbeke but unknown even to the airlines when Fife arrived in London. Evidence was also introduced concerning Jones' behavior at Kennedy Airport in New

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light of the absence of any corroboration, this court condemned the repeated efforts by the judge to limit a full exploration of the accomplice's past criminal history. Moreover, in *United States* v. *Cruz*, 455 F.2d 184 (2d Cir.), *cert. denied*, 406 U.S. 918 (1971), and in *United States* v. *Curcio*, *supra*, cases affirming convictions over objections of improper judicial interference, the conduct of the trial judges was far more intrusive than occurred in the case at bar, with the judge engaging in persistent examination of witnesses, frequently interrupting defense counsel and generally interfering in the conduct of the case.

York, in particular his waiting for Fife's baggage and his false exculpatory statement that he did not know Fife. Also probative was the evidence concerning a visit to Fife by an attorney whose firm had been requested by a California attorney, Singer, to interview Fife. This mysterious visit was followed shortly by a telegram from "Bob" in California confirming the visit by the attorney (Gov. Ex. 2 at 206, 382-383). Additional evidence was introduced by stipulation connecting the appellant Van Meerbeke with the telegram, Gov. Ex. 2, in the form of an advertisement for the sale of a car that was billed to Van Meerbeke's telephone number (Gov. Ex. 7 at 444-445).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 26th day of November, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Barry A. Bohrer, Esq.	Guy L. Heinemann, Esq.
410 Park Avenue	410 Park Avenue
New York, N.Y. 10022	New York, N.Y. 10022

Evelyn Cohen

Sworn to before me this
26th day of Nov. 1976

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York